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NO. 86-1932

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

DARYL GATES, et al.

v.

DOLORES LANGFORD, et al.

BRIEF OF AMICUS CURIAE, DISTRICT ATTORNEY OF LOS ANGELES COUNTY, CALIFORNIA, AND JOINING CITY AND COUNTY LAW ENFORCEMENT OFFICIALS OF CALIFORNIA, IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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NO. 86-1932

IN THE
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On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE, DISTRICT ATTORNEY OF LOS ANGELES COUNTY, CALIFORNIA, AND OTHER JOINING CITY AND COUNTY LAW ENFORCEMENT OFFICIALS OF CALIFORNIA, IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

BRIEF OF AMICUS CURIAE

Pursuant to Rule 36, subdivision (1) of the Rules of the United States Supreme Court, written consent of the parties having been obtained and accompanying the brief (to be filed concurrently therewith), Amicus Curiae, Ira Reiner, District

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Attorney of Los Angeles County submits this brief in support of the petition for writ of certiorari.

INTEREST OF AMICUS CURIAE

The Los Angeles County District Attorney's Office prosecutes felony narcotics and dangerous drug cases predicated on seizures of contraband by the Los Angeles City Police Department and the Los Angeles County Sheriff's Department. Each of these departments is in possession of its own respective type of motorized battering ram intended for use against an increasingly prevalent type of fortified structure which is specially designed to frustrate the execution of search warrants, as well as to provide anonymity to drug dealers, i.e. the "rock house." The decision of the California

Supreme Court sought to be reviewed herein inflexibly subjects both of these types of rams (despite differences in these battering rams which were conceded to be significant by the then Chief Justice of that Court) to the same rigid requirements of prior judicial authorization before deployment in a particular case without regard to rapidly changing circumstances. It follows that the opinion below directly affects the successful prosecution of cases within the jurisdiction of amicus curiae, the District Attorney of Los Angeles County.

Furthermore, not only Los Angeles County, but the entire State of California is impacted by the decision of the Court below. The law enforcement agencies (sheriffs and police chiefs) joining this brief as amici curiae, being charged with

the duty of protecting the public against criminal narcotics and drug traffickers, and facing increasingly ingenious devices (such as rock houses) to frustrate their abilities to carry out their responsibilities, have an obvious interest in preserving their historic discretion in the selection of appropriate tactical means for the effective execution of search warrants. (See e.g. affidavits attached hereto as Appendix B, post.)

SUMMARY OF ARGUMENT

By a process of judicial legislation, the California Supreme Court has interpolated into the warrant clause of the Fourth Amendment an additional element requiring prior judicial authorization of the means of execution of search warrants where those means are deemed, a priori, "inherently dangerous," over-

extensively including by definition all motorized battering rams regardless of type. This novel interpretation represents a sweeping revision of the Fourth Amendment, unfounded either in its plain terms, or historic purpose, contrary to its construction by this Court, and fundamentally restricting the ability of law enforcement to respond flexibly to changing circumstances in confronting the increasing use of "rock houses" by those who traffic in illegal drugs, a national epidemic.

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ARGUMENT

THE CALIFORNIA SUPREME COURT ERRONEOUSLY UNDERTOOK A SWEEPING REVISION OF THE WARRANT CLAUSE OF THE FOURTH AMENDMENT BY ADDING TO ITS REQUIREMENTS PRIOR JUDICIAL AUTHORIZATION OF THE MEANS OF EXECUTION WHERE SUCH MEANS CONSIST OF THE USE OF A "MOTORIZED BATTERING RAM" (REGARDLESS OF TYPE) OR OTHER DEVICE DEEMED "INHERENTLY DANGEROUS"

The instant case presents an issue of constitutional construction. Fundamentally, "when the text of a constitutional provision is not ambiguous, the courts in giving construction thereto, are not at liberty to search for its meaning beyond the instrument." (Lake County v. Rollins 130 U.S. 662, 670 [1889].) This applies "whatever might be the views entertained

of its expediency." (Ogden v. Saunders 25 U.S. 212, 303 [1827].) Accordingly, "'where the intention is clear there is no room for construction and no excuse for interpolation or addition.'" (United States v. Sprague 282 U.S. 716, 731-732 [1921] quoted in Reid v. Covert 354 U.S. 1, 8 [1957].)

The terms of the Warrant Clause of the Fourth Amendment "are precise and clear." (Stanford v. Texas 379 U.S. 476, 481 [1965].) On "the face of the Amendment" (Zurcher v. Stanford Daily 436 U.S. 547, 554 [1978]), the clause merely provides that "no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U. S. Const., Fourth Amend.) This Court "has

interpreted [this clause] to require only three things," i.e. (1) issuance by neutral disinterested magistrate, (2) probable cause that the evidence sought will aid in apprehension or conviction for a particular offense, and (3) a particular description of things to be seized and place to be searched. (See Dalia v. United States 441 U.S. 238, 255 [1979] [does not also require prior justification of covert entry as a potential method of installing judicially-authorized bugging equipment], see also Zurcher, supra, 436 U.S. at 554 [does not also require probable cause to believe that third party owner of place to be searched is implicated in the crime].) 1/

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1. This comports with the fact that the primary purpose of the Fourth Amendment was to put an end to the general warrants and writs of assistance under

(continued...)

This Court in Dalia went on to point out that:

> Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officer to determine the details of how best to proceed with the performance of a search authorized by warrant--subject of course to the general Fourth Amendment protection "against unreasonable searches and seizures."

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1. (...continued)
which officers of the Crown had been empowered to conduct general searches and seizures. (See Warden v. Hayden 387 U.S. 294, 301 [1967].) On the other hand, "[s]uspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would had he complied with [statutory knock-notice requirements]" (Ker v. California 374 U.S. 23, 39 [1963]). A fortiori, the same would apply to other niceties, neither of constitutional, statutory, nor of common law origin.

(Supra, 441 U.S. at 257.)

As to this last qualification, the Dalia court explained that "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." (Id. 441 U.S. at 258.) That this principle applies also to methods of forced entry (e.g. the motorized battering ram) is made clear in footnote 19 of the Dalia opinion where this Court states:

> For example, courts have upheld the use of forceful breaking and entering where necessary to effect a warranted search, even though the warrant gave no indication that force had been contemplated. See, e.g., United States v. Gerbato, 474 F2d 40, 41 (CA3), cert. denied, 414 U.S. 864, 94 S.Ct. 39, 38 L.Ed.2d 84 (1973). To be sure, often it is impossible to anticipate when these actions will be necessary. See Note, Covert Entry in Electronic Surveillance: The Fourth Amendment Requirements, 47 Ford.L.Rev. 203, 214 (1978). Nothing in the decisions of this Court,

> however, indicates that officers requesting a warrant would be constitutionally required to set forth the anticipated means for execution even in those cases where they know beforehand that unannounced or forced entry likely will be necessary. See 2 W. LaFave, Search and Seizure 140 (1978). (Ibid. at fn 19.)

Despite this Court's exegesis of the "three requirements" imposed on search warrants by the Fourth Amendment (Id. 441 U.S. at 257), the California Supreme Court construed "Fourth Amendment protection" (Langford v. Superior Court 43 Cal.3d 21, 31, 233 Cal.Rptr. 387, 395, 729 P.2d 822, 829 [1987]) so as to require that "[b]efore authorizing potential use of the battering ram, the magistrate finding probable cause for the underlying search must apply an additional balancing test to

determine whether use of the device is appropriate." (Ibid.) 2/

This interpolation into the Warrant Clause of an "additional" requirement violates this Court's canons of constitutional construction (United States v. Sprague, supra, 282 U.S. at 731-732) and directly contradicts this Court's substan-

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2. In a earlier decision, the California Supreme Court itself had observed that:

> "Inasmuch as the Legislature has provided no authority for inserting directions in warrants excusing compliance with statutory announcement requirements and has in fact impliedly barred such a procedure, the courts are without power to institute a practice of issuing such warrants unless prior judicial authorization of noncompliance is constitutionally mandated. We conclude that it is not." (Parsley v. Superior Court [1973] 9 Cal.3d 934, 939, 109 Cal.Rptr. 563, 566, 513 P.2d 611, 614.)

tive interpretation of the Fourth Amendment (Dalia, supra, 441 U.S. at 255-257), resulting in a "sweeping revision of the Fourth Amendment," itself. (Zurcher, supra, 436 U.S. at 554.)

Contrary to the California Supreme Court, discretionary deployment of the ram to execute search warrants without specific prior judicial authorization is neither "presumptively unreasonable" nor in violation of basic constitutional guarantees. (Contrast Langford, supra, 43 Cal.3d at 29, 233 Cal.Rptr. at 393, 729 P.2d at 827-828 with Ker v. California, supra, 374 U.S. at 39, inter alia, quoting People v. Maddox 46 Cal.2d 301, 306, 294 P.2d 6, 9 [1956] [unannounced entry]; Dalia, supra, 441 U.S. at 257 [covert entry to install pre-authorized bugging device].)

Any such required prior authorization would not only "extend the Warrant Clause to the extreme," but also be "unnecessary" given the availability of (1) "later judicial review" of the case (Dalia, supra, 441 U.S. at 258) and (2) state legislative review of the general problem (Ker, supra, 374 U.S. at 34, cf. Langford, supra, 43 Cal.3d at 29, 233 Cal.Rptr. at 393, 729 P.2d at 827-828, referring to Penal Code section 1533 [magistrate's discretion to permit night-time service]), preserving the function of the Constitution as a general outline of powers granted, limited, and reserved. (See M'Culloch v. Maryland, 17 U.S. 316, 404-407 [1819].)

It must be recognized that "conditions and circumstances vary just as do investigative and enforcement techniques."

(Ker, supra, 379 U.S. at 34.) As Justice (now Chief Justice) Lucas pointed out below in his dissent, "[t]he record also indicates that in many situations, the need for action is immediate and any delay beyond obtaining the requisite departmental approval might result in the loss or destruction of incriminating evidence or contraband." (Langford, supra, 43 Cal.3d at 44, 233 Cal.Rptr. at 403, 729 P.2d at 838, Lucas, J., dissenting, citing Parsley v. Superior Court, supra, 9 Cal.3d at 940, 109 Cal.Rptr. at 563, 513 P.2d at 611 ["[f]acts existing at the time of obtaining a warrant may no longer exist at the time of entry"].)

The foregoing considerations indicate the inappropriateness of requiring prior judicial authorization as to tools of forced entry into structures which might

turn out to be fortified or which can be potentially fortified at the last minute so as to delay execution of a previously acquired search warrant. Before-the-fact judicial review would necessarily extend to a range of entry devices which might be deemed to be "inherently dangerous" and to a range of potential field situations since an ordinary structure might be later discovered to have hidden fortifications or to be newly fortified at the time of execution. Such uncertainty would needlessly encumber the process of obtaining search warrants whenever a potential "rock house" is suspected.

The weakness of the California Supreme Court's position is reflected in the fact that its requirement of prior judicial authorization is made <u>a priori</u> applicable to "the motorized battering

ram" as such, without differentiation as to type (see Langford, supra, 43 Cal.3d at 24, 28, 31, 32, 233 Cal.Rptr. at 389, at 392-395, 729 P.2d at 824, 826,829, 830). Yet, then Chief Justice Bird in her concurring opinion found it "interesting to note that the Los Angeles County Sheriff's Department has apparently developed a motorized battering ram that is as effective as the V-100 but involves none of the dangers which the V-100 poses." (Id. 43 Cal.3d at 43, fn. 14, 233 Cal.Rptr. at 403, fn. 14, 729 P.2d at 837, fn. 14, Bird, C. J., concurring.) 3/

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3. The California Supreme Court concedes that "defendants dispute the level of risk posed by the V-100 battering ram" and refers instead to a speculative "potential" danger. (Langford, supra, 43 Cal.3d at 29, 233 Cal.Rptr. at 393, 729 P.2d at 826.) That court also conceded that in denying injunctive relief, the trier of fact "agreed with defendants," finding "insufficient data" of misuse.

(continued...)

Since the Sheriff's type of ram "involves none of the dangers which the V-100 [allegedly] poses," its similar treatment by the California Supreme Court illustrates the absurdity of rigid a priori characterization of forcible entry devices as being sufficiently "inherently dangerous" to require prior judicial authorization.

Mr. Justice Powell of this Court has pointed out that:

> The public has compelling

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3. (...continued) (Ibid.) In his dissenting opinion, Justice (now Chief Justice) Lucas pointed out that "most police work is inherently dangerous, frequently entailing high-speed chases, gunfire and explosives," all without requiring prior judicial authorization, and that "[n]o compelling reason exists for singling out the V-100 for special treatment" since "the record indicates that the ram has been used on several prior occasions without inflicting any serious injury." (Id. 43 Cal.3d at 44, 233 Cal.Rptr. at 403, 729 P.2d at 838, Lucas, J., dissenting.)

> interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement. (United States v. Mendenhall 446 U.S. 544, 561-562 [1980], Powell, J. concurring.)

Part of "the serious societal threat posed by narcotics distribution" (Mendenhall, supra, 446 U.S. at 562; Powell, J., concurring) is the drug-dealers "latest ... tactic," i.e., the "rock house," a heavily fortified, secure structure in which narcotics activity takes place (see Appendix B, post,

affidavit of Gerald W. Boyd, Chief of Police, City of Coronado). It is in this context that the motorized, battering ram was developed. Its purpose was not, as the California Supreme Court suggests, to merely provide "a destructive and dangerous means of forcible entry into an occupied dwelling" (Langford, supra, 43 Cal.3d at 28, 233 Cal.Rptr. at 392-393, 729 P.2d at 827), but rather to defend society against fortified narcotics distribution centers. "Rock houses" are not primarily "dwellings" except in guise and appearance. In reality they are sources of an infection spreading throughout our society primarily attacking our youth, destroying lives, and undermining families. The amount of damage inflicted by a battering ram against such a structure is as nothing compared to the damage

caused by that same "rock house" to the surrounding neighborhood and community. As pointed out by Justice (now Chief Justice) Lucas, "given the fact that the V-100 ram is only used to enter fortified houses where narcotics transactions occur, and that careful administrative scrutiny is required before each use, no Fourth Amendment violation can arise here." (Id. 43 Cal.3d at 45, 233 Cal.Rptr. at 404, 729 P.2d at 838, Lucas, J., dissenting.)

CONCLUSION

The Fourth Amendment does not require prior judicial authorization of police tactics (specifically the motorized battering ram) in the execution of search warrants. The police afford citizens the full protection of the Fourth Amendment when they obtain warrants authorizing searches. Warrants authorizing the means

used for these searches are not encompassed within the Fourth Amendment.

For these compelling reasons of constitutional integrity and public safety, review by this Court is clearly warranted.

Respectfully submitted,

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APPENDIX B

AFFIDAVIT OF OLIVER TAYLOR

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned affiant hereby declare, under oath, that the following is true and correct:

1) I have been employed as a peace officer for the Los Angeles County Sheriff's Department for 28 years, the last three of which I have been the Chief of the Sheriff's Detective Division. If called as a witness herein, I would and could competently testify to the following facts and circumstances.

2) As Chief of the Detective

Division, I am in charge of various criminal investigative bureaus of the Sheriff's Department including the Homicide, Vice, Juvenile Investigations, Central Investigations, Commercial Crimes and Narcotics Bureaus. In order to effectively investigate this type of criminal activity, search warrants are served under all conceivable circumstances and exigencies. The tactical decisions relating to the proper method of service of these warrants and the degree of force needed to safely and successfully execute them has traditionally been and should remain a law enforcement function. Although this necessity is important in all criminal investigations, it is of particular importance in narcotics investigations.

3. Cocaine "rock houses" are an example of the extent to which criminals will fortify their illegal activities. Because these houses are typically fortified with steel bars and steel reinforced doors, it is extremely difficult to enter such premises using conventional law enforcement resources. It is imperative that law enforcement personnel be free to respond to this kind of sophisticated criminal activity in a quick and effective manner, which may include using innovative tools of their own, such as the Los Angeles Police Department's motorized ram. The Sheriff's Department has developed a Barricade Entry Device which consists of a 16 foot steel pipe mounted onto the front of a heavy-duty mechanized skip loader. After the pole

penetrates the area above a fortified door or window of a "rock house", a lever is automatically released inside the location and the door or window is pulled out. Because the debris and structure portions are pulled away from the building, and entry is made at the upper structure level, there is little danger to the occupants inside. Although the Barricade Entry Device differs in design from L.A.P.D.'s motorized ram, it will be deployed in similar circumstance when the need arises.

4) It is my belief that requiring prior judicial approval before the deployment of such devices will inhibit law enforcement's ability to detect and deter criminal activity and will unnecessarily jeopardize the safety of the

peace officers involved. Such a ruling, if upheld, will deprive law enforcement officers of the on the spot discretion needed to combat the ever increasing, changing and sophisticated criminal activities which create the threats to persons and property to which law enforcement must be allowed to quickly and effectively respond.

s/t/ Oliver Taylor
OLIVER TAYLOR

Subscribed and sworn to and before this 19th day of June 1987 at Los Angeles,

s/t/ Cynthia M. Valenzuela
Notary Public of the State of California for the County of Los Angeles

Official Seal CYNTHIA M. VALENZUELA Notary Public - California Principal Office in Los Angeles County My Commission Expires April 19, 1989

San Diego County

POLICE CHIEFS' & SHERIFF'S

Association . . .

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I, GERALD W. BOYD, Chief of Police, City of Coronado, California, in my capacity as President of the San Diego County Police Chiefs' & Sheriff's Association, and in support of the Petition for a Writ of Certiorari to the California Supreme Court in the case of Doris Langford, et al. v. the Superior Court of Los Angeles County, Daryl Gates, as Chief of Police, et al., Real Parties in Interest, state the following under penalty of perjury:

The importation, manufacture and distribution of controlled substances is

one of the major law enforcement problems in the County of San Diego, California. As law enforcement techniques improve, defendants react to counter such techniques. The latest defense tactic is the "rock house", a heavily fortified, secure structure in which narcotics activity takes place, guarded electronically, with bars on windows, door security, and closed circuit video. The execution of search or arrest warrants with its attendant knock and notice provisions is a futile act in those situations where the occupants of the premises do not wish to be contacted. Law enforcement personnel attempting to breach the house's security are in extreme danger not only from armed occupants, but also from booby traps, electrically charged wires, and other life-threatening implements.

In response to the development of these fortified "rock houses", the Los Angeles Police Department developed the V-100 battering ram.

The V-100 is only one tool of many which have been used in appropriate situations to gain forcible entry, none of which have ever required prior judicial authorization and all of which fulfill the requirements of the Fourth Amendment. The requirement for prior judicial authorization for use of such devices is both unreasonable and dangerous. If, in service of an arrest or search warrant, the need for such device becomes apparent, and there exists a requirement for judicial approval prior to use, a number of very detrimental consequences may reasonably be predicted. Criminal suspects may utilize the additional time

to further fortify and/or "booby trap" the location to be entered. Suspects may also utilize the time to arm themselves or to destroy evidence.

Once a magistrate has issued an arrest or search warrant, law enforcement authorities should not be hindered in the legitimate exercise of their duties. They should not be subjected to the meaningless approval of a magistrate should they discover fortifications which preclude a forced entry without the aid of the V-100 or other instrumentality. Law enforcement agencies need the V-100 unencumbered by delay to properly execute arrest and search warrants in accordance with their duties.

The requirement of judicial authorization before the Los Angeles Police Department can use its V-100 motorized ram

will have widespread ramifications. Unless reversed by the United States Supreme Court, the ruling will apply to all police departments within the State of California. Additionally, this ruling may logically be extended to include other devices which are used to gain forcible entry. Upholding this ruling could have effects which are potentially injurious to the health, welfare, and safety of police

officers, persons who are the subject of an arrest or search warrant, and the general public.

s/t Gerald W. Boyd
GERALD W. BOYD

SWORN TO AND SUBSCRIBED before me this 17 day of June, 1987,

s/t Gail B. Jordan
Notary Public of the State of California for the County of Los Angeles

Official Seal GAIL B. JORDAN Notary Public - California Principal Office in San Diego County. My Commission Expires March 8, 1989.